IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8051 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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M A VYAS

Versus

STATE OF GUJARAT

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Appearance:

1. Special Civil Application No. 8051 of 1999

MR IS SUPEHIA for Petitioner No. 1

MR N.D.GOHIL, AGP for Respondents

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CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 10/09/2003

ORAL JUDGEMENT

Heard learned advocate Mr. I.S.Supehia for the petitioner and learned AGP Mr. N.D.Gohil appearing on behalf of respondents.

2. The case of the petitioner is that he was serving as Additional Assistant Engineer under respondent No.1 and, his case for promotion to the post of Deputy Executive Engineer has not been considered because of the conscious decision taken by the respondents to initiate the departmental inquiry against the petitioner and, therefore, petitioner is superseded and his junior has been promoted to the post of Deputy Executive Engineer on 15.6.1999.

3. Learned advocate Mr. Supehia appearing on behalf of the petitioner has submitted that this Court (Coram: Ms. R.M.Doshit,J) has passed an order dated 2.2.2000 in Civil Application No. 356 of 2000 with a direction to the respondents to grant ad hoc promotion to the petitioner to the post of Deputy Executive Engineer. The said order is quoted as under:

"Heard the learned advocates.

The applicant herein is the petitioner in Special Civil Application No. 8051/1999. It is undisputed that the petitioner is eligible for promotion to the post of Deputy Executive Engineer and his name having been considered for such promotion, he has also been found to be fit for promotion by the Departmental Promotion Committee. However, inspite of his having been selected by the Departmental Promotion committee, he has been superseded by his juniors. Feeling aggrieved, the petitioner has preferred the above referred writ petition.

It is contended that though the petitioner has been selected, in view of the disciplinary action contemplated against him, he has not been promoted. It is submitted that the decision to initiate disciplinary action against the petitioner has been taken by the State Government on 11th March, 1999. However, it is conceded that as yet no formal chargesheet has been issued against the petitioner. Feeling aggrieved, the present applicant claims ad hoc promotion subject to the disciplinary action and the final outcome thereof.

It does appear that the State Government has been indolent in initiating the disciplinary action against the petitioner. The petitioner cannot be deprived of his legitimate right to promotion on

account of delay caused by the State Government. It is, therefore, directed that unless the disciplinary action is initiated against the petitioner within a period of one month from today, the petitioner shall be given ad hoc promotion as Deputy Executive Engineer and be given suitable posting. Such order shall be made on or before 3rd March, 2000. The promotion made under this order shall be subject to the result of the writ petition and the disciplinary action, if any. The petitioner shall not be entitled to further promotion on the basis of such ad hoc promotion nor shall he have the right to promotional post.

Application is disposed of in the above terms. Direct service is permitted."

4. Thereafter, in Civil Application No.2713 of 2000, this Court has directed to the respondents to review the case of the petitioner for promotion to the post of Deputy Executive Engineer on ad hoc basis and same is required to be decided by the respondents on or before 21.6.2000.

What subsequent developments took place in view of the aforesaid two orders passed by this Court is not known to either Mr. Supehia or learned AGP Mr.Gohil.

5. Affidavit-in-reply has been filed by the respondents raising the contention that the petitioner was selected and his name was included in the select list by the respondents. A conscious decision was taken by the competent authority on 11.3.1999 to initiate the departmental inquiry against the petitioner and therefore, according to the respondents promotion is not given to the petitioner though he was selected and junior was promoted on 15.6.1999. It is clear from the reply filed by the respondent that from 11.3.1999 till the date of affidavit-in-reply of 19.1.2000 charge sheet has not been served to the petitioner. Even Mr. Supehia has submitted that as per the Rejoinder dated 25.1.2000 charge sheet has not been served to the petitioner. This being undisputed facts between the parties, now only question required to be examined that though conscious decision has been taken by the competent authority on 11.3.1999 to initiate the departmental inquiry against the petitioner whether respondent is right in not granting the promotion to the petitioner though junior has been promoted on 15.6.1999. The second question is that respondent is right, not to give promotion merely on

the basis of having the conscious decision of competent authority dated 11.3.1999. This aspect has been examined by the Apex Court in reported decision of UNION OF INDIA V. K.V.JANKIRAMAN, AIR 1991 SC 2010. The relevant observations made in para 6 are quoted as under:

"On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. the sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc., does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge/sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it would not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions

are as follows:

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2).....

(3).....

(4) the sealed cover procedure can be restored only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before;"

There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion No.1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.

We, therefore, repel the challenge of the appellant-authorities to the said finding of the Full Bench of the Tribunal."

6. In view of the observations made by the Apex Court that a charge-memo in disciplinary proceedings or charge-sheet in criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal proceedings is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure, meaning thereby to deny promotion or to supersede the petitioner while granting the promotion in favour of the petitioner by order dated 15.6.1999. In view of this fact, there is nothing on

record that charge sheet has been served to the petitioner by the respondents. Petitioner was selected by the Departmental Promotion Committee and his name has been included in the select list by the Committee and denied promotion on the ground of conscious decision dated 11.3.1999. Therefore, to supersede the petitioner or deny the promotion to the petitioner is illegal and same is required to be quashed and set aside. Therefore, considering the undisputed facts and circumstances of the case and in light of two orders passed in Civil Applications as referred above, the present petition is required to be allowed.

7. In result the action or decision of the respondent not to grant promotion to the petitioner or to supersede the petitioner is hereby quashed and set aside with a direction to the respondents to promote the petitioner to the post of Deputy Executive Engineer from 15.6.1999 with all consequential benefits including the difference of salary and other service benefits within a period of three months from the date of receiving the copy of this order. Rule is made absolute accordingly. No order as to to costs.

(H.K.Rathod,J)

Jayanti*